

1 James L. Miller, Esq. SBN 123944
2 P.O. Box 195, 308 1/2 Marine Ave.
3 Newport Beach, CA 92662-0195
4 (949) 675-3590 fax (949) 675-3591
5 jlimesq@dslextrreme.com

6 Attorney for Newport Harbor Lutheran

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 NEWPORT HARBOR LUTHERAN
11 CHURCH, A California Non-Profit Corp.,
12 as Assignee from Abigail Abbott Staffing
13 Services, Inc.

14 Plaintiffs,

15 vs.

16 FEDERAL INSURANCE COMPANY;
17 CTK INSURANCE SERVICES; Does 1 to
18 15

19 Defendants

CASE NO.: SACV 11-0562-DOC (MLGx)

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR REMAND**

DATE: June 20, 2011
TIME: 10:00 a.m.
Courtroom: 9-D

20 TO THE PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE THAT plaintiff, Newport Harbor Lutheran Church
22 ("NHLC"), hereby moves this court for an Order to Remand the Removal of this action
23 to Orange County Superior Court, set for hearing as indicated above.

24 This motion is brought on the grounds that there is less than complete diversity
25 of citizenship in the plaintiff's initial pleading, rendering federal diversity jurisdiction
26 inappropriate, since the California co-defendant continued to and is still doing the same
27 business, under the same name, and at the same location, as the agent alleged in the
28 plaintiff's complaint. These facts and circumstances establish incomplete diversity of

TABLE OF CONTENTS

Page No.

MEMORANDUM OF POINTS AND AUTHORITIES

1. SUMMARY OF ARGUMENTS. 3
2. BACKGROUND FACTS OF THE UNDERLYING ACTION AND FOR THIS MOTION. 3
3. DEFENDANT WILL NOT BE ABLE TO CARRY ITS SUBSTANTIAL BURDEN IN PROVING THAT JOINDER OF CTK IS FRAUDULENT. 4
4. CURIOUSLY, WITH DEFENDANT AS THE PARTY WHICH MUST CARRY A 'HIGH BURDEN', AND SINCE DEFENDANT HAS NOT YET MADE ITS ARGUMENT OR PRESENTED EVIDENCE, PLAINTIFF HEREIN ESTABLISHES ALL REQUIRED OF IT FOR REMAND. 6
5. REMOVAL WAS NOT TIMELY. 8
6. CONCLUSION. 9

TABLE OF AUTHORITIES

Page No.

Cases

<i>Diaz v. Allstate Ins. Group</i> , 185 F.R.D. 581, 586 (C.D. Cal. 1998).	5
<i>Dodson v. Spiliada Maritime Corp.</i> , 951 F.2d 40, 42 (5 th Cir. 1983).	5
<i>Lewis v. Time, Inc.</i> , 83 F.R.D. 455, 460 (E.D. Cal. 1979).	5
<i>Gaus v. Miles, Inc.</i> 980 F.2d 564, 566 (9 th Cir. 1992).	5
<i>Good v. Prudential Ins. Co. of America</i> , 5 F.Supp.2d 804, 807 (N.D.Cal. 1998).	5,6
<i>Green v. Amerada Hess Corp.</i> , 707 F.2d. 201, 205 (5 th Cir. 1983).	5
<i>Marks v. Minnesota Mining & Mfg. Co.</i> (1986) 187 Cal.App.3d 1429, 1435.	7
<i>Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.</i> , 526 U.S. 344, 347 (1999)	8,9

Statutes

28 U.S.C. §1332(a).	5
28 U.S.C. §1441(a).	5
28 U.S.C. §1446(b)	8
<i>California Code of Civil Procedure</i> §415.40	8

Treatises

Schwartz, Tashima et al., <u>California Practice Guide: Federal Civil Procedure</u> <i>Before Trial</i> §2:670	5
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1 parties, and certainly are sufficient to refute defendant's burden of proving fraudulent
2 joinder.

3 Plaintiff also moves to remand since this matter was not removed until 32 days
4 after the defendant's "receipt" of the Summons & Complaint, which had been delivered
5 to it pursuant to formal process under California Code of Civil Procedure §415.40.

6 Commencing with plaintiff's counsel's letter of April 25, 2011 to defense
7 counsel, Stephen Newton, his written response and other communications between the
8 parties' counsel, there have been numerous efforts to meet and confer about this motion
9 which have yet failed to resolve these issues.

10 This motion is made pursuant to 28 U.S.C. §§1447 and 1446(b), and their
11 interpretations, and based upon this Notice and the Memorandum of Points and
12 Authorities hereunder, the Declaration of James L. Miller, and any Exhibits thereto, and
13 oral arguments or evidence subsequently submitted hereon.

14 Dated: May 12, 2011

15
16
17 
18 James L. Miller, Esq.

MEMORANDUM OF POINTS AND AUTHORITIES

1. SUMMARY OF ARGUMENTS.

Plaintiff moves to remand on two grounds: 1. This matter is not completely diverse since the alleged agent or broker of the carrier is a citizen of Orange County, California; and 2. Although the matter was removed within 30 days of the effective date of service pursuant to CCP 415.40, notice of removal was not filed within 30 days of defendant's receipt, and 28 U.S.C. §1446(b) provides that "receipt" and not "service" is what is to be measured to determine if removal had been timely.

2. BACKGROUND FACTS OF THE UNDERLYING ACTION AND FOR THIS MOTION.

In about mid-2002 plaintiff requested a temporary, office-manager employee from the allegedly now-defunct, local Orange County-based hiring agency, Abigail Abbott ("Abbott"). Plaintiff's long-term office person was aging and retiring, and the Church was looking for a good – but above all trustworthy – eventual permanent replacement. (Cheryl) Leann Granger seemed both competent and willing, and so a few months after Abbott selected and placed Ms. Granger as the sole office personnel of Newport Harbor Lutheran Church ("NHLC"), plaintiff paid Abbott for this second act of performance, this time to hire Ms. Granger as a "permanent" referral. Unfortunately, and unknown by all others during that time, in the 1990s Ms. Granger had accumulated a criminal record in Los Angeles County for three instances of embezzlement. As NHLC's office manager, she forged checks and stole from the Church, as best as could be reconstructed, about \$323,000 between 2002 and 2006. The Newport Beach police tracked her down with her husband who was a computer science professor at now Dartmouth College, and in 2008 Ms. Granger was sentenced in Orange County Court to six years in a California prison.

Back to this Motion for Remand. Plaintiff sued Abbott for its negligence in not referring a "trustworthy" person, and since all of Abbott's insurers denied it even a

1 defense, Abbott settled with NHLC primarily with an assignment of rights pertaining to
2 the denied coverage(s) along with a judgment and Abbott's costs of defense to be
3 enforced against the Abbott carrier(s). (The actual Settlement Agreement is supposed
4 to remain confidential in its terms). NHLC has now sued the instant defendants
5 pursuant to this assignment. The foreign defendant, Federal Insurance, has removed,
6 and in the process claims that the local defendant was added merely as a sham. Since
7 Abbott is no longer operating, NHLC is proceeding on the limited information that it
8 obtained from Abbott. Abbott was represented by James Bernald of Howrey, and now
9 that firm is also dismantled.

10 So, plaintiff's counsel paid a visit to the co-defendant agency on May 23, 2011, and
11 spoke with its present co-owner (and/or the wife of the owner), Belva Seymer. The
12 pertinent substance of that conversation is set forth in the Declaration of James L.
13 Miller served and filed with this motion, but in essence, it seems to plaintiff that despite
14 the contention by the defense that the agency changed form and legal filing status, it is
15 still active, and in Anaheim, and that it still can be sued and held liable for actions
16 relating to the time frame of the Abbott coverage at issue.

17 After the removal papers were reviewed, on April 18, 2011 plaintiff checked to see
18 if indeed CTK Insurance Agency ("CTK") was out of business. It is not, and therefore
19 counsel sent a meet and confer letter to defense counsel requesting voluntary remand,
20 which was refused. Documentation printed from CTK's website, including a page
21 which indicates CTK has been serving Orange County as "a leading provider of
22 insurance products" since it was "founded in 1974" was attached to the letter for proof.
23 A true and correct copy of that letter and the attachments are Exhibit "1" to the Miller
24 Declaration.

25
26 **3. DEFENDANT WILL NOT BE ABLE TO CARRY ITS SUBSTANTIAL**
27 **BURDEN IN PROVING THAT JOINDER OF CTK IS FRAUDULENT.**

28 A federal court has removal jurisdiction over a matter brought in state court if it

1 would have had original jurisdiction. 28 U.S.C. §1441(a). Federal courts have original
2 jurisdiction under ‘diversity’ if the amount in controversy exceeds the monetary
3 threshold (which this one admittedly does) and the action is between parties of diverse
4 citizenship. 28 U.S.C. §1332(a). An exception to the requirement of complete
5 diversity exists where it appears that a plaintiff has fraudulently joined a “sham” non-
6 diverse defendant. Schwartz, Tashima et al., *California Practice Guide: Federal Civil*
7 *Procedure Before Trial* §2:670 (Thompson West 2010). Fraudulent joinder is a term of
8 art, and requires no proof of scienter on the part of the plaintiff. Id. @ 671. *Lewis v.*
9 *Time, Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979).

10 Courts also recognize a “strong presumption” against removal jurisdiction; the
11 burden is on the removing party to demonstrate that removal is proper. *See, e.g., Gaus*
12 *v. Miles, Inc.* 980 F.2d 564, 566 (9th Cir. 1992). Similarly, “courts generally employ a
13 presumption against fraudulent joinder.” *Diaz v. Allstate Ins. Group*, 185 F.R.D. 581,
14 586 (C.D. Cal. 1998). The defendant’s burden is a heavy one, and it must prove that
15 there is absolutely no possibility that the plaintiff will be able to establish a cause of
16 action against the in-state defendant in state court. *Green v. Amerada Hess Corp.*, 707
17 F.2d. 201, 205 (5th Cir. 1983). On a motion for remand, the court will not predict
18 whether the plaintiff will actually or even probably prevail on the merits, but the court
19 only looks for the *possibility* that plaintiff may do so. If that possibility exists, then a
20 good faith assertion of such expectancy in state court is not a sham, and does not
21 constitute a fraudulent joinder, in fact or in law. *Good v. Prudential Ins. Co. of*
22 *America*, 5 F.Supp.2d 804, 807 (N.D.Cal. 1998). The defendant must demonstrate that
23 this is *no possibility* that the plaintiff will be able to establish a cause of action in state
24 court against the alleged sham defendant. Therefore, in order to apply this high
25 standard of proof required of the removing party, the court must resolve all issues of
26 fact and all ambiguities in the law in favor of the non-removing party. *Dodson v.*
27 *Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1983).

4. CURIOUSLY, WITH DEFENDANT AS THE PARTY WHICH MUST CARRY A 'HIGH BURDEN', AND SINCE DEFENDANT HAS NOT YET MADE ITS ARGUMENT OR PRESENTED EVIDENCE, PLAINTIFF HEREIN ESTABLISHES ALL REQUIRED OF IT FOR REMAND.

There is no question that CTK Insurance Agency is alive and well and operating in Anaheim, California. Based both upon the fact that Abbott provided NHLC with some cover sheets from CTK indicating CTK provided Abbott's coverages, and from such further confirmation from CTK's website and the brief conversation with Ms. Seymer at CTK in early May 2011, there is no doubt that CTK is the proper party to this lawsuit.

From the meet and confer correspondence from Federal's counsel, it seems that Federal will be attempting to establish that the active and operating "CTK Insurance Services" is currently a different entity than the "CTK Insurance Services" that provided Abbott with its coverages between 2002 and 2006. However, it is clear from the Googled pages attached to Miller's Meet and Confer letter (Exhibit "1" to this Motion) that all of the name, address, and telephone numbers are those same ones which CTK listed on the Abbott correspondence which was provided to NHLC. The phone, address and name on the website of "ctkins.com" are also the exact same numbers as those on the Abbott insurance correspondence that it provided to NHLC. (It seems also that from its website moniker CTK is likely using the same web-domain address as it did initially). CTK also holds itself out to the public, certainly for marketing purposes, both on the side of its building and on the building directory, as the very same-named insurance agency that existed during the Abbott coverage periods.

Really, nothing has changed about CTK except allegedly legal disclosure filings with the California Secretary of State. Based upon this, at best for Federal mixed evidence, there clearly exists a "possibility" that plaintiff can establish a cause of action against CTK in state court. (*Good v. Prudential, supra*; *Dodson v. Spiliada Maritime, supra*).

1 Moreover, assuming a change in legal form, legal standards nonetheless indicate
2 that there is at least a triable issue as to whether the current CTK is a successor in
3 liability for the alleged former CTK. Firstly, if one corporation has merged into
4 another, the surviving corporation is subject to all liabilities of the merged or now-
5 defunct corporation. On its website, CTK informs the public that it is now "part of the
6 INSURICA Insurance Management Network." (See the pages attached as part of
7 Exhibit "1"). Ms. Seymer also mentioned this fact. Is this what caused CTK's
8 governmental filings change(s)?

9 There is also the *possibility* that the current CTK is liable (if it is actually a different
10 entity than the original CTK) as a successor under the precept of "*de facto*" merger
11 liability. *Marks v. Minnesota Mining & Mfg. Co.* (1986) 187 Cal.App.3d 1429, 1435.
12 Broadly, a *de facto* merger results from a corporate acquisition in the form of an asset
13 sale, but which, in effect, achieves the same result as a merger. Five factors are
14 relevant:

- 15 1. Consideration (was a stock swap part of the transition);
- 16 2. Did purchaser continue the same business after the sale;
- 17 3. Are Seller's shareholders some of purchaser's shareholders;
- 18 4. Was Seller liquidated after the 'sale';
- 19 5. Did purchaser assume those same liabilities of the seller as necessary to carry on
20 the seller's business.

21 For a motion to remand we do not need to know the answers to all of these
22 questions; there is enough objective evidence of successor liability to create such a
23 possibility. The Motion for Remand has to be brought (timely), and eventually
24 discovery we reveal the answers. However, we do know that CTK continued at the
25 same location under the same name to which it held itself out to the public, and for sure
26 kept Abbott as a client until sometime in 2010, and CTK is likely servicing the same
27 client list, who were probably told the product and service is just the same, and such
28 continuity was undoubtedly a huge part of any alleged transition. CTK, the current one,

1 obviously did not want to be known to its clients and referrals as a different entity due
 2 to some filing with the Secretary of State. It wanted to keep the same identity, via the
 3 same address, website, phone numbers, etc. All this is clear from the objectively
 4 verifiable, and indisputable, evidence.

5 Other than its undisclosed ownership, CTK now (purposely) appears to be no
 6 different than the CTK involved with Abbott's insurance during the period relevant to
 7 the assignments granted to plaintiff. We have the right defendants and there is no
 8 question that CTK Insurance Services is a citizen of California.

10 **5. REMOVAL WAS NOT TIMELY.**

11 28 U.S.C. §1446(b) reads in relevant part:

12 The notice of removal of a civil action or proceeding shall be filed
 13 within thirty days after the *receipt* by the defendant, through service or
 14 otherwise, of a copy of the initial pleading setting forth the claim for
 relief upon which such action or proceeding is based, or within thirty days
 after the service of summons . . . whichever period is shorter.

15 In the meet and confer, the defense has taken the position that the date of service
 16 controls, but the code section still reads "receipt" of the initial pleading. The Supreme
 17 Court has interpreted section 1446 in *Murphy Bros., Inc. v. Michetti Pipe Stringing,*
 18 *Inc.*, 526 U.S. 344, 347 (1999), and ruled that receiving a faxed, courtesy copy of the
 19 complaint was insufficient "receipt." The Supreme Court goes on to explain that the
 20 time to remove is "not [triggered] by mere receipt of the complaint unattended by any
 21 formal service." *Id.* @ 348.

22 C.C.P. Section 415.40 provides that the out-of-state defendant may be served by
 23 sending a copy of the summons & complaint, via U.S. Mail, Certified and Return
 24 Receipt, to the defendant's address. Plaintiff has availed itself of this manner of service
 25 by sending the initial pleading to Federal Insurance at its home office in New Jersey, on
 26 March 7, 2011. Since it was certified mail, plaintiff checked by telephone to the USPS
 27 when the delivery was made, and the official Post Office record of item No. 7007
 28 26890 0001 8295 9536 states that Federal signed as "receiving" the Summons &

1 Complaint at 9:40 a.m. on March 11, 2011.

2 Plaintiff takes the position that long-arm service, which is permissible and
3 inexorably leads to "service", pursuant to C.C.P. §415.40, is significantly
4 distinguishable from a faxed courtesy copy of the initial pleading. Plaintiff contends
5 that such "service", despite the fact that the defendant has an extra 10 days from
6 "mailing" (not receipt) to file a responsive pleading, is nevertheless tantamount to the
7 'formal process' which the Supreme Court calls for in *Murphy Bros.* to trigger the clock
8 for the removal deadline.

9 Since Federal did not file its Notice of Removal until April 12, 2011, which is 32
10 days after the Post Office reports it received the process, plaintiff contends that removal
11 was untimely, and order of remand should then follow.

12
13 **CONCLUSION.**

14 It does not seem that defendant can carry its heavy burden of proving that CTK is a
15 sham defendant. Unfortunately for defendant, it has remained in business and appears
16 to be acting just like it did when it was involved with Abbott before that firm became
17 defunct. There is patently a "possibility" of liability of the 'current' CTK. As such, we
18 do not have complete diversity, and remand is appropriate.

19 Secondly, it seems that the statute addressing "receipt" is clear, and despite some
20 further clarification by the Supreme Court, the commencement of the removal clock is
21 still measured by receipt, and not 30 days prior to when a responsive pleading is due.

22 Wherefore, plaintiff respectfully requests that the court remand this action to Orange
23 County Superior Court.

24
25 DATED: May 11, 2011

26
27 
28 James L. Miller for NHL

PROOF OF SERVICE

State of California, County of Orange

At the time of service, I was over the age of 18 years and not a party to this action. My business address is P.O. Box 195, Newport Beach, CA 92662-0195.

On May 12, 2011, I served the following document(s):

Notice of Motion and Motion for Order to Remand Action to Superior Court

The documents were served upon the following persons at the addresses:

Stephen Newton
P.O. Box 1059
Mountain View, CA 94042

The documents were served by the following means:

☐ (By U.S. Mail) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☐ Placed the envelope or package for collection and mailing, following ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

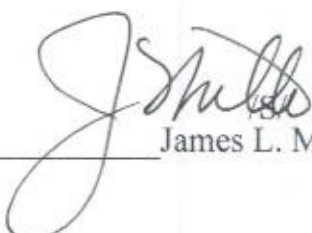
☐ (By Overnight Delivery) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and delivery at an office or regularly used drop box of the overnight delivery carrier.

☒ (By Electronic Service) I caused the forgoing document to be served by electronic service through the courts' website.

☐ (By Personal Service) I caused the envelope or package to be personally delivered to the persons at the addresses listed above.

I declare that I am employed in the office of member of the bar of this Court at whose direction the service was made.

Executed on 5/12, 2011 at Newport Beach, California.


James L. Miller